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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 MARIA DEL SOCORRO QUINTERO
12 PEREZ C.Y., a Minor, and B.Y., a
Minor,

13 Plaintiffs,

14 vs.

15 UNITED STATES OF AMERICA,
16 UNITED STATES DEPARTMENT
OF HOMELAND SECURITY,
17 UNITED STATES CUSTOMS AND
BORDER PROTECTION OFFICE OF
BORDER PATROL, JANET
18 NAPOLITANO, THOMAS S.
WINKOWSKI, DAVID AGUILAR,
ALAN BERSIN, KEVIN K.
19 McALEENAN, MICHAEL J.
FISHER, PAUL A. BEESON,
20 RICHARD BARLOW, RODNEY S.
SCOTT, CHAD MICHAEL NELSON,
21 and DORIAN DIAZ, and DOES 1-50,

22 Defendants.

CASE NO. 13cv1417-WQH-
BGS

ORDER

23 HAYES, Judge:

24 The matter before the Court is the Motion for Leave to File Second Amended
25 Complaint filed by Plaintiffs (ECF No. 51).

26 **I. Background**

27 On June 17, 2013, Plaintiffs commenced this action by filing a Complaint in this
28 Court. (ECF No. 1). On December 16, 2013, the parties filed a joint motion for leave

1 to amend the Complaint. (ECF No. 23). On December 18, 2013, the Court granted the
2 motion for leave to amend. (ECF No. 24). On January 2, 2014, Plaintiffs filed a First
3 Amended Complaint (“FAC”). (ECF No. 25). On February 18, 2014, the United
4 States, the Agency Defendants, and the Supervisor Defendants sued in their official
5 capacities¹ filed a motion to dismiss, and the Supervisor Defendants and Agent
6 Defendants sued in their individual capacities² filed a motion to dismiss. (ECF Nos. 26-
7 27). On September 3, 2014, the Court granted in part and denied in part both motions
8 to dismiss. (ECF No. 46).

9 On October 6, 2014, Plaintiffs filed the Motion for Leave to File Second
10 Amended Complaint. (ECF No. 51). On October 20, 2014, Defendant David Aguilar
11 filed an opposition. (ECF No. 56). On October 27, 2014, Plaintiffs filed a reply. (ECF
12 No. 58).

13 **II. Contentions of the Parties**

14 Plaintiffs contend that Defendants will not be prejudiced from clarifying existing
15 theories in the First Amended Complaint. Plaintiffs contend that the proposed second
16 amended complaint demonstrates that Defendants Napolitano, Bersin and Aguilar knew
17 of and acquiesced in the Rocking Policy. Plaintiffs contend that the proposed second
18 amended complaint establishes personal jurisdiction over Defendant Aguilar by alleging
19 additional facts regarding Defendant Aguilar's knowledge and acquiescence. Plaintiffs
20 contend that the proposed second amended complaint establishes secondary liability
21 against Agent Nelson.

22 Defendant Aguilar contends that the proposed second amended complaint alleges
23 insufficient facts to establish specific personal jurisdiction over Defendant Aguilar.

25 ¹ These Defendants were the United States of America, U.S. Department of
26 Homeland Security, U.S. Customs and Border Protection, Office of Border Patrol, Janet
27 Napolitano, Thomas S. Winkowski, Alan Bersin, Kevin K. McAleenan, Michael J.
Fisher, Paul A. Beeson, Richard Barlow, and Rondey S. Scott.

28 ² These Defendants were Janet Napolitano, Thomas Winkowski, David Aguilar,
Alan Bersin, Kevin McAleenan, Michael Fisher, Paul Beeson, Richard Barlow, Rodney
Scott, Chad Nelson, and Dorian Diaz.

1 Defendant Aguilar contends that the proposed second amended complaint is no
 2 different than the FAC in this regard. Defendant Aguilar contends that he should not
 3 have to continue defending this action because personal jurisdiction has not been
 4 established over him.

5 **III. Discussion**

6 Federal Rule of Civil Procedure 15 mandates that leave to amend “be freely given
 7 when justice so requires.” Fed. R. Civ. P. 15(a). “This policy is to be applied with
 8 extreme liberality.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th
 9 Cir. 2003) (quotation omitted). In determining whether to allow an amendment, a court
 10 considers whether there is “undue delay,” “bad faith,” “undue prejudice to the opposing
 11 party,” or “futility of amendment.” *Foman v. Davis*, 371 U.S. 178, 182 (1962). “Not
 12 all of the [*Foman*] factors merit equal weight.... [I]t is the consideration of prejudice
 13 to the opposing party that carries the greatest weight.” *Eminence Capital*, 316 F.3d at
 14 1052 (citation omitted). “The party opposing amendment bears the burden of showing
 15 prejudice.” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987).
 16 “Absent prejudice, or a strong showing of any of the remaining *Foman* factors, there
 17 exists a *presumption* under Rule 15(a) in favor of granting leave to amend.” *Eminence*
 18 *Capital*, 316 F.3d at 1052.

19 In the September 3, 2014 Order, the Court found that “[t]he FAC’s general
 20 allegations of [Defendants Winkowski, Aguilar, and McAlleenan’s] supervisory
 21 responsibilities and alleged implementation of the Rocking Policy, without more, do not
 22 satisfy Plaintiffs’ prima facie burden to satisfy the purposeful direction test.” (ECF No.
 23 46 at 14). The Court further found that “these federal officers’ alleged
 24 omissions—failures to train, supervise, and prevent or correct the use of the Rocking
 25 Policy—are not ‘intentional acts[s] ... expressly aimed at the forum state.’” *Id.* (citing
 26 *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199, 1206
 27 (9th Cir. 2006)). The Court also noted that “[w]hether the Court may exercise *specific*
 28 jurisdiction over these Defendants will depend on whether Plaintiffs can allege forum-

1 related activity giving rise to their claims.” *Id.* at 15.

2 The proposed second amended complaint adds factual allegations against
3 Defendant Aguilar. The Court will defer consideration of Defendant Aguilar’s
4 challenge to personal jurisdiction and any challenges to the merits of the proposed
5 second amended complaint until after the amended pleading is filed. *See Netbula v.*
6 *Distinct Corp.*, 212 F.R.D. 534, 539 (N.D. Cal. 2003) (“Ordinarily, courts will defer
7 consideration of the challenges to the merits of a proposed amended pleading until after
8 leave to amend is granted and the amended pleading is filed.”).

9 After review of the motion, the proposed second amended complaint, and the
10 filings of the parties, the Court concludes that Defendants have not made a sufficiently
11 strong showing of the *Foman* factors to overcome the presumption under Rule 15(a) in
12 favor of granting leave to amend. *See Eminence Capital*, 316 F.3d at 1052.

13 **IV. Conclusion**

14 IT IS HEREBY ORDERED that Plaintiffs’ Motion for Leave to File Second
15 Amended Complaint (ECF No. 51) is GRANTED. Plaintiffs shall file the Second
16 Amended Complaint, as set forth as an exhibit to the Motion (ECF No. 51-2), **within**
17 **ten (10) days** from the date this Order is filed. Defendants shall respond to the Second
18 Amended Complaint **within fourteen (14) days** from the date the ~~First~~ ^{Second} Amended
19 Complaint is re-filed. Fed. R. Civ. P. 15(a)(3).

20 DATED: November 19, 2014

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22 **WILLIAM Q. HAYES**
23 United States District Judge
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(mdc)